Moving the West's Water to New Uses: Winners and Losers (Summer Conference, June 6-8) 1990

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Evaluating Judicial Capacity to Determine Public Welfare Values in Water Transfers

Charles T. DuMars

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Charles T. DuMars

Professor of Law
University of New Mexico
School of Law

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Natural Resources Law Center
University of Colorado School of Law
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Introduction

Summary

New Mexico's water transfer statute, like many others in western states, includes the term "public welfare" as one of those items a judge or hearing officer must determine in evaluating transfer of water from one place to another or from one use to another. This presentation examines the concept of "public welfare" and the question of which institution is best equipped to determine the whether a transfer is consistent with the "public welfare". Specifically, the author questions whether a fair determination of the public welfare can be made in the context of judicial/administrative hearings. The author suggests it cannot because the decision makers are ill suited to make such decisions and because the forum is inadequate to accurately and fairly evaluate a question that is at bottom a political one. The speaker suggests that a regional water planning process is more likely to produce a better determination of the nature of the public welfare

in this context.

General References:

C. DuMars, M. Minnnis "New Mexico Water Law: Determining Public Welfare Values in Water Rights Allocation", 31 Ariz. L. Rev. 817 (1989)

Grant, "Public Interest Review of Water Allocation and Transfer in the West: Recognition of Public Values," 19 Ariz. State L.J. 681 (1987)

Getches, "Water Use Efficiency: The Value of Water in the West", 8 Pub. Land L. Rev. 1 (1987)

Ingram, et. al., "Measuring the Public Welfare Value in Water" (The Water and Public Welfare Project, Udall Center for Studies in Public Policy 1988)

1. Public Welfare--a case in point, Sleeper v. Ensenada Land and Water Ass'n.

This case, decided by a district court in New Mexico and reversed on other grounds in an opinion not worthy of review, presented a square challenge to the traditionally accepted notion that public welfare values in water can be measured exclusively within the concept of beneficial use. Here, a private ski development company sought to transfer water from an acequia(small irrigation ditch) to be used for its ski resort. The previous use--irrigation was a beneficial use under New Mexico law, as was the transfer to use--commercial ski resort use. The trial court in evaluating the transfer and ultimately in turning it down, evaluated the concept of public welfare including his personal perception of the importance of agriculture to the region. He also evaluated the new use in terms of the cultural value of menial jobs at a ski area and overall net economic benefit to the community. It provides a nice backdrop for the ensuing discussion.

2. Water Scarcity and the Public Welfare

The West is in the midst of a population explosion in its urban centers in the face of finite water resources. Submitting proposed water rights transfers to the test that they not harm public welfare is an expression of growing uneasiness with the market allocation system of water. Ordinarily mistrust of markets does not extend to other minerals in commerce such as coal, copper and other energy fuels. Where these resources are concerned society has developed ways of mitigating the undesirable social and environmental consequences of letting the market run its course. Depletion costs have been accepted in exchange for cash in the form of severance taxes.

When water is the resource and short supply a factor, however, strict market allocation is drawn into question. Water is perceived as akin to air, and a large segment of society seems unprepared

to deal with the reality that giving the market exclusive control in wester water might displace from competition those who could not bear the going rates. A "ghost town " created because the water has "played out" is not an image a substantial segment of society is willing to readily accept.

3. The Continuum of Public Welfare Values in Water.

On one end of the public welfare values in water continuum,, we find decisions categorically made by the Congress of the United States that certain species are entitled to protection irrespective of beneficial uses under state law. The prime example, of course, would be a species protected under the Endangered Species Act". Or, perhaps a national treasure such as Yellowstone National Park.

On the other end are not doubt the thoughts in the minds of the persons sitting miles away on the other seaboard who have no intention of ever visiting a stream, but whose "karma" is much better served because they know the stream is running unimpeded to the sea.

Where the United States Congress has spoken on this topic, the task is easy for the decision maker. Where, however, it becomes a contest of personal preferences and emotions, true facts can rarely be a match for a good soul cleansing outrage. The decision maker's task is a great deal more difficult in this context.

4. Environmental, Recreational and Scenic Values and the Public Welfare.

There can no question that the values in water flows for birds and aquatic life, including the preservation of wetlands are important. Indeed, the simple beauty of an area with a stream passing through it is important. Likewise, water as a source of transportation for white water rafters, is entitled to protection. The problem comes in striking the balance. The number of fishing licenses sold, binoculars to bird watchers and the dollar value of film sold, cannot accurately measure these values. Nor, can a parade of testimonials by persons who view these values as important be given much judicial weight.

5. Economic Values in water.

Economic values in water come closer to being measurable. Water is among the most fundamental means of production. This can result from its physical capacity to be converted to steam to its ability to transport barges along main river channels. Because of its fluidity it can generate hydropower and it is essential to sustain the work force who work in factories. Finally, it is essential to agricultural production for the food that feeds us all. For this reason almost 75% of the water resource is used in agriculture. Yet, the value of agriculture to society, and of the crops grown, and the costs of the pollutant by-products of agricultural production are being brought into question. Water rights transfer now can involve the question of who should capture the economic rent in the sale, who will pay for the cost of increased salinity in return flows and whether the crops grown provide any net direct benefit to society.

6. Cultural Values in Water

More and more, respect for antiquities and diverse cultures is being reflected in our society. Indeed changes in the immigration laws are bringing to the country a host of individuals such as Hispanics and Indians from Latin America who possess a strong desire to retain cultural differences.The cultures of Native Americans are likewise more and more being considered important to our social fabric. Further, there is a growing nostalgia for things as they were in the past and a romanticism about the values still preserved in Anglo rural America. Public welfare analysis often leads to a balance between the interests of those who would move water to new higher economically valued uses and the interests of those who reflect the less economically viable but historically entrenched uses of rural society.

7. Conservation Values and the Public Welfare.

Where water is scarce, the tendency to prefer present over future uses is strong, and the duty to ensure usable water resources for future generations, while acknowledged in principle usually fails in the face of present demand. Still, partly because of the acknowledged disastrous effects of improvident resource exploitation in other parts of the world, long-term management values are creeping into water transfers. This concern for an accurate evaluation of the present value effects of decisions bearing fruit far into the future is more and more being expressed in water transfer contexts.

8. Conjunctive Management Issues and the Public Welfare.

For reasons of economics and water quality, traditional users of surface water have sunk wells to extract water from the aquifers hydrologically connected to the stream. This ensures a more reliable supply because it does not vary with surface runoff. It also, in general, provides better quality water due to the filtration action of the soils. However, the water in storage can be extracted only for a set period of time. Eventually, all of the water from the groundwater source will begin to come from the stream. To what degree should these wells be allowed--should there be a retirement schedule? Should the pumper retire the surface rights up front? Is it a good idea to take the groundwater in storage and build a society on that source if the only reliable long-term supply is the stream? These are all public welfare questions?

9. Groundwater Mining and Public Welfare.

Much of our groundwater is found in confined aquifer having been deposited there by surface precipitation over geologic time. In effect it is a mined resource that once taken will not come back under time frames relevant to most of us. At what rate should the drawdown take place? How much should be left for future uses? How much should be spent on well-spacing and optimization practices? Should economics play a role in forfeiture decisions? What role is there for conservation? These are all public welfare questions.

10. Water quality and the public welfare.

Traditionally the water transfer statutes have forbidden a transfer that would "impair" another's right. How much impairment is too much in the context of water quality? Salinity pollution presents a classic example. Saline water can be used for irrigation, it simply requires more of it. Every decision that a transfer should or should not be allowed involves an analysis of the relative efficiencies of the two individual users. For example, should a transfer that, increases one farmer's economic return by 75 per cent be denied because, due to salinity encroachment, it would reduce the return on equity of another farmer by two per cent? Should large new diversion dams be turned down because they tend to lower the temperature of water being released from the bottom of the pool and to reduce total dissolved solids, thereby affecting the native squafish or humpback chubs? These are public welfare questions.

11. Efficiency versus Waste, fertile ground for public welfare confusion.

Terms such as efficiency and waste and conservation are proper fuel for the public welfare debate, but people rarely mean the same thing when they use these terms. Consider three different meanings in the context of Agriculture. A professor of agriculture might insist that, in farming, water is consumed in only three ways--transpiration through the plants, evaporation from open sources and deep percolation. Therefore a use which held these loses to an absolute minimum would be an efficient one. An economist, however, would suggest that even if one utilized the absolute minimum amount of water to grow crops, this would be a waste of water if there were a more profitable use for the water elsewhere.

A person who appreciates rare birds would castigate both the agriculture professor and the economist and argue that it would be a "waste" of water to use it for any purpose than to "conserve" the last remaining members of a rare bird species by creating a wetland. The correct answer as to what is waste in the public welfare context depends on whether one measures waste with a laser plane for leveling fields, a calculator with a discount rate function, or an ornithological guide and a hope that one's children will have an opportunity to observe the variety of species that can be seen today.

12. The Best Forum for evaluating Public Welfare.

Overzealous trial lawyers are not the first persons to think of public welfare in water allocation. Indeed the attached chart, reflects a great deal of thinking on this topic. It displays an array of values that can be considered. The issue is not what variables should go in to the calculus, rather, it is the capacity of the forum to do the weighing of these values. The author submits that the administrative/judicial forum is inadequate to conduct this balance for the following reasons:

1. The issues are non-technical and subjective. Because of this, judges can rarely give relief which protects all of the interests at stake in the controversy.

2) The expert testimony, if any, will tend to cloak values in numbers and be based in the final analysis on subjective assumptions of the experts.

3. Reaching a final, error free, resolution would be difficult

because the traditional screening devices of relevance and materiality are useless since virtually all opinions are relevant on the topic, making for endless proceedings with no certainty of final result.

4. Because of the breadth of the subject matter, the person with the greatest financial staying power would win, due to the extensive discovery costs and opportunities for appeal and delay.

5. At the administrative level, the typical decision maker is a person trained in engineering or some other technical area and lacks the staff to help him/her make a decision on subject matter of this kind. At the judicial review level, the judge, while perhaps able to perceive the overall policy issues, is constrained by his attempts to arrive at a "holding" on what is essentially a philosophical-political debate.

6. The values of certainty through clear judicial precedent, which lie at the heart of American jurisprudence would not be served because every case would turn on its own facts and any judicial ruling would simply be composed of a reiteration of talismanic phrases, meaningful only in the context of the next dispute, but useless as planning tools.

13. Regional Water Planning as a possible alternative.

The author proposes that a system of regional water planning as set out in the attached statute may be superior, in that it allows the people of a region to participate in the definition of the public welfare of the area. Assuming complete notice and opportunity to be heard, and absent an "unconstitutional taking" by the planning process, these plans could aid the administrative/judicial decision makers in defining public welfare issues. These plans could be treated as prima facia correct and only be subject to review where clearly erroneous. A copy of the New Mexico regional water planning statute is attached.

Identifiers for gross impact on selected environmental resources and values, along with rankings of importance of impacts, as experienced in certain dam, reservoir, irrigation, and hydroelectric projects

Environmental Resources and Value / Project Component		Physical Resources								Biological Resources				Human Use Values														Quality of Life Values						
		Surface Water Hydrology	Surface Water Quality	Ground Water Hydrology	Ground Water Quality	Soils	Geology/Seismology	Erosion/Sedimentation	Climate	Fish	Aquatic and Terrestrial Ecology	Terrestrial Wildlife	Forests	Agriculture/Irrigation (if applicable)	Aquaculture	Fisheries	Water Supply	Navigation	Recreation	Power (if applicable)	Flood Control	Dedicated Area Uses	Industry	Agro-Industry	Mineral Development	Highways/Railways	Land Use	Socio-Economic	Resettlement	Cultural/Historical	Aesthetic	Archeological	Public Health	Nutrition
Dam and Reservoir	A	3	2	2	1	–	–	3	1	((3))	((3))	((3))	2	(3)	(3)	((3))	(3)	(2)	(3)	(3)	(3)	3	–	–	(2)	((2))	3	(3)	3	1	((3))	1	((2))	(3)
	B	3	–	3	–	2	3	–	1	..	1	–	–	–	–	–	–	–	–	–	..	–	–	..	1	1	–	–	3	–	–	–	1	–
Irrigation System	A	1	3	2	–	3	–	2	–	(3)	(3)	1	–	(3)	(3)	(3)	(3)	–	(1)	–	–	–	(2)	(2)	–	1	3	(3)	–	–	–	–	(2)	(3)
	B	2	3	3	1	3	3	3	1	–	3	–	–	–	–	–	–	–	–	–	–	–	–	–	–	1	–	–	–	–	–	–	–	–
Hydroelectric Power and Transmission	A	–	–	–	–	–	–	1	–	–	–	1	3	1	–	–	–	–	–	3	–	–	3	2	–	–	3	(3)	–	–	2	–	–	–
	B	1	–	1	1	2	2	1	–	–	1	1	3	–	–	–	–	–	–	–	–	1	1	1	1	–	–	–	–	–	–	–	–	–

Source:
V. R. Pantulu, "An analysis of environmental and social impacts of multiple objective river basin development projects," paper presented at the Interregional Seminar on the Assessment and Evaluation of Multiple Objective Water Resources Projects, Budapest, Hungary, October 1985. Adapted from the National Environmental Board, Thailand, 1979.

Notes:
(a) (A) means significant impact of project on environmental resources, whereas (B) means impact of the environment on the project.
(b) Numerical value of 3 means probable major impact, 2 means intermediate, and 1 means significant but relatively minor.
(c) Numbers in parentheses indicate effects are mostly enhancement of environment.
Numbers in double parentheses represent combination of adverse and beneficial effects.
Numbers without parentheses represent either adverse or beneficial effects.

The Legislature

of the

State of New Mexico

38TH Legislature, 1ST Session

LAWS 1987

CHAPTER 182

HOUSE BILL 337, AS AMENDED

Introduced by

REPRESENTATIVE DICK MINZNER AND REPRESENTATIVE RAYMOND G. SANCHEZ

REPRESENTATIVE MAURICE HOBSON
REPRESENTATIVE EDWARD C. SANDOVAL

CHAPTER 182

AN ACT

RELATING TO WATER; AUTHORIZING THE INTERSTATE STREAM COMMISSION TO FUND REGIONAL WATER PLANNING EFFORTS, APPROPRIATE UNAPPROPRIATED WATER AND PURCHASE WATER RIGHTS; MAKING AN APPROPRIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. LEGISLATIVE FINDINGS--STATE APPROPRIATION OF UNAPPROPRIATED WATER.--Based upon the findings and recommendations of the report from New Mexico state university and the university of New Mexico on state appropriation of unappropriated water, the legislature finds that:

A. the future water needs of New Mexico can best be met by allowing each region of the state to plan for its water future;

B. the state can assist the regions in planning future water use by implementing a state appropriation program to ensure an adequate supply of water for each region, as reflected in each region's water use plan; and

C. the interstate stream commission is the appropriate agency to implement such a program.

Section 2. INTERSTATE STREAM COMMISSION--GROUNDWATER APPROPRIATION--WATER RIGHTS PURCHASE--WATER PLANNING FUNDING.--

A. The interstate stream commission is authorized to appropriate groundwater or purchase water rights on behalf of any of the various regions of the state.

B. Nothing in this section shall be construed as per-

House Bill 337, aa
Approved April 8, 1987

mitting the condemnation of water rights or as determining, abridging or affecting in any way the water rights of Indian tribes.

C. The interstate stream commission is authorized to make grants or loans of funds for the purpose of regional water planning. Prior to approval of any proposal by a region for planning funds under this section, the commission shall develop criteria for evaluating such proposals. These criteria at a minimum shall provide for:

(1) identification of the region requesting planning funds and why it is hydrologically and politically an appropriate applicant;

(2) use of an appropriate planning process including opportunities for participation by those Indian tribes located within the various regions of the state;

(3) reasonable proposed costs and time tables for completion of the planning process;

(4) appropriate provisions for notice, review and comment where applicable;

(5) adequate review of potential conflict with laws relating to impact on existing water rights;

(6) adequate review of water conservation and the effect on the public welfare; and

(7) identification of sources other than the interstate stream commission for funding of the proposed regional planning process.

D. A water planning region eligible for funding under this section is an area within the state that contains sufficient hydrological and political interests in common to make water planning feasible. The state as a whole shall not be considered a water planning region for purposes of this section.

E. No entity shall be made a part of a proposal for planning funds under this section without its consent.

F. No funds shall be granted under this act to any party or parties that are not within a water planning region. Whether a proposal for funding falls within a water planning region shall be determined on a case by case basis by the interstate stream commission after consultation with the state engineer and consideration of the following:

(1) whether the source of water and the potential place of use of the water are located within the same hydrologic basin; and

(2) if there is more than one party and the parties are requesting funds on a joint basis, whether the parties have demonstrated political and economic interests in common by entering into a binding intergovernmental agreement for carrying out the planning process.

Section 3. APPROPRIATION.--One hundred fifty thousand dollars ($150,000) is appropriated from the general fund to the interstate stream commission for expenditure in the seventy-sixth fiscal year to carry out the provisions of this act. Any unexpended or unencum-

bered balance remaining at the end of the seventy-seventh fiscal year shall revert to the general fund.